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No. 11, Original

Office Supreme Court, U. S.
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In the Supreme Court

of the United States

OCTOBER TERM, 1928

THE STATE OF COLORADO, *Complainant*,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation,

Defendants.

OBJECTIONS OF COMPLAINANT TO THE FILING OF THE MOTION AND TO THE MOTION FOR LEAVE TO INTRODUCE THE EVIDENCE OF A. J. ABBOTT AND JAMES CRAIG TAKEN IN A PRIOR CASE, AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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FRED A. SABIN,
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Comes now the complainant herein and objects to the filing of defendants' motion for leave to introduce the evidence of A. J. Abbott and James Craig, taken in a prior case, and brief in support thereof, and objects to the motion itself as follows:

I.

To the filing of said motion and brief:

1. The ruling desired here is one of substantive law and not purely procedural.

2. The motion as presented is not proper procedure.

3. The evidence which defendants are moving to have admitted is already in the transcript of the Commissioner

to take testimony and is not at this time properly before this Honorable Court for consideration.

II.

To the motion for leave to introduce said evidence:

1. This is not the proper time or manner to urge such a motion.

2. Under the present disclosures of the record in this case to now urge that the offers of the evidence of said witnesses in a prior case is competent, relevant and material, as against the objection of counsel for complainant made before the Commissioner to take testimony as shown in the following statement of facts, raises a question of substantive law and not one of procedure.

3. The motion is redundant and surplusage.

WHEREFORE, Complainant moves this Honorable Court that said motion and brief be not filed, or, in the event the said motion and brief are permitted to be filed, that said motion be denied, reserving the ruling on complainant's objections to the admissibility of said testimony until the final consideration of this case.

BRIEF AND ARGUMENT IN SUPPORT OF THE FOREGOING OBJECTIONS.

STATEMENT OF FACTS

Complainant supplements the statement of facts made by defendants in their brief in support of their motion for leave to introduce the evidence of A. J. Abbott and James Craig, taken in a prior case, as follows:

1. That on September 29, 1930, at Garden City, Kansas, before Millen S. Atwood as the Stenographic Commissioner duly commissioned to take testimony in this action, the said deposition of A. J. Abbott taken February 17, 1923,

at Santa Fe, New Mexico, was admitted in evidence by said Commissioner over the objection of this complainant. That said deposition appears in full on pages 925 to 990 inclusive in Volume VII of the transcript of the evidence taken at Garden City, Kansas, September 29, 1930, as prepared by said Commissioner.

2. That the offer in evidence of this deposition on the part of these defendants and the objections to the introduction thereof on the part of this complainant were duly made on September 29, 1930, and the objections appear in said transcript in Volume VII, at pages 921 to 924, inclusive, as follows:

"MR. SMITH: Now, the defendants offer in evidence the deposition of Judge A. J. Abbott, taken at Santa Fe, New Mexico, on the 5th—on the 17th day of February, 1923, in a case pending in the United States District Court of the District of Colorado, in which the defendant, The Finney County Water Users' Association was complainant, and the following named individuals and corporations were defendants: The Graham Ditch Company, a corporation; The Colorado and Kansas Canal and Reservoir Company, a corporation; The Lamar Land and Canal Company, a corporation; The Fort Lyons Canal Company, a corporation; The Oxford Farmers Ditch Company, a corporation; The Rocky Ford Canal, Reservoir, Land, Loan and Trust Company, a corporation; The Catlin Consolidated Canal Company, a corporation; The Rocky Ford Ditch Company, a corporation; The X. Y. Irrigating Ditch Company, a corporation; The Manvil Canal, Reservoir and Improvement Company, a corporation; The Twin Lakes Land and Water Company, a corporation; The Twin Lakes Reservoir Company, a corporation; The Canon City, Florence and Pueblo Water Company, a corporation; The Bessemer Irrigating Ditch Company, a corporation; The Holbrook Irrigation District, a Public Corporation; The Otero Irrigation District, a Public Corporation; The Arkansas Valley Sugar Beet and Irrigated Land Company, a corporation; and Colorado Southern Irrigation Company, a corporation.

"That at the taking of said deposition, Mr. Fred A. Sabin, who is now one of the solicitors for complainant,

was solicifor for all of the defendants named in the said deposition, appeared in their behalf, and cross-examined the said witness.

"That the said Judge A. J. Abbott is now deceased. This being a carbon copy of the original deposition now on file in the office of the Clerk of the United States District Court of Colorado.

"We offer this on the theory that the same issues were involved in that case, and that the witness is now dead, and his testimony cannot be procured.

"MR. SABIN: Colorado objects to the introduction of the deposition offered by Senator Smith, Solicitor for the corporation defendant here, on the ground that the deposition and its contents are irrelevant, incompetent and immaterial, for the following reasons:

"1st. It is not a deposition taken in any proceeding then, or at all, pending between the parties to the proceeding now here on trial.

"2nd. Because the issues involved in the proceedings in which that deposition was taken, were not the same issues involved in the proceeding now here on trial.

"3rd. That this proceeding is one between sovereign states, and involves only matters of state concern, and is not such a proceeding as will permit of the establishment on the part of the corporation defendant in this proceeding, of any date of priority for the Farmers ditch owned by the corporation defendant.

"4th. The deposition offered relates largely, if not exclusively, to dates prior to 1905, being the date or year in which the taking of testimony in the case of Kansas versus Colorado, was closed. Our theory being that conditions prior to 1905, and specifically to the date upon which testimony ceased to be taken in that year, are foreclosed by the decision in the case of Kansas versus Colorado, and those matters there involved became, and are res adjudicata, by reason of which the decision of Kansas versus Colorado is the law of this case with reference to matters which arose prior to 1905.

"The decision in Kansas versus Colorado was a decision between the same litigants, same sovereign states, that are parties to this proceeding, and the court there determined that, as shown by the record in that case, there had been up to the time the taking of testimony in that case ceased, no such infringement by Colorado upon the rights

of Kansas, and in fact that there had been no infringement at that time which would justify the maintenance of the Bill of Kansas filed in Kansas versus Colorado, and that consequently the court dismissed the bill, with the statement in the opinion that if at any time in the future, Colorado should impinge upon the rights of Kansas, to the extent that such impingement would amount to an encroachment upon the equitable rights of Kansas to the waters of the Arkansas river, Kansas might come back and set up such facts. The position of Colorado, therefore, is that only matters arising since that decision, which we take to be res adjudicata and controlling upon the parties hereto on the conditions existing up to the time of the ceasing of the taking of testimony in Kansas versus Colorado, can be gone into in this proceeding. Always reserving to Colorado, however, the right in this proceeding to object to any testimony subsequent to 1905, on the ground that this proceeding should be limited to the prayer in the original bill of complaint herein, which deals only with enjoining or prohibiting certain litigation pending in the United State District Court for the District of Colorado between citizens of Colorado and citizens of Kansas.

"No objection is made to the offer, on the ground that the document offered, is merely a carbon copy of the original.

"MR. EGAN: The state of Kansas also offers this deposition of Mr. Abbott in evidence, and represents that the issues involved in the case in which that deposition was taken, are, by virtue of the bill of the state of Colorado, and of the answer of the state of Kansas, brought into this case, on the theory advanced by the State of Colorado that it represents in this case the water appropriators and ditch owners in Colorado.

"MR. SABIN: Colorado objects to the offer on behalf of the state of Kansas, upon the ground that the deposition offered is incompetent, irrelevant and immaterial, for the same reasons and upon the same grounds that it set forth in the record as grounds for the objection to the offer by the defendant, The Finney County Water Users' Association."

3. That on September 30, 1930, at Garden City, Kansas, before said Commissioner the said deposition of James

Craig taken February 12, 1923, at Los Angeles, California, was likewise admitted in evidence over the objection of this complainant. That said deposition or so much thereof as defendants offered appears in full on pages 1151 to 1171, inclusive, in Volume VIII of said transcript of September 30, 1930.

4. That the offer in evidence of this deposition on the part of these defendants and the objections to the introduction thereof on the part of this complainant were duly made on September 30, 1930, and the objections appear in said transcript in Volume VIII at pages 1148 to 1150, inclusive, as follows:

"MR. SMITH: The defendants now offer in evidence the first twenty-six pages of the transcript, which I now hand to the Commissioner for identification (marked Kansas' Exhibit 6), being a part of the deposition of James Craig, taken at Los Angeles, California, on the 12th day of February, 1923, in the case of The Finney County Water Users' Association, pending in the United States District Court for the District of Colorado, against the same defendants as were named in the deposition of Judge A. J. Abbott, offered in evidence yesterday. James Craig had charge of the construction of the Farmers' ditch. These twenty-six pages constitute his testimony with reference to the construction of that ditch, the date it commenced, size and carrying capacity of the ditch, the number of laterals that were constructed, the amount of land under the ditch capable of irrigation, and other details concerning the construction of the ditch, and nothing more.

"I also want the record to show that Mr. Fred A. Sabin, who is now solicitor for the complainant in this case, was solicitor for the defendants in the case of The Finney County Water Users' Association vs. The Graham Ditch Company, and others, appeared at this hearing and cross-examined this witness.

"MR. SABIN: You mean, at the hearing in 1923?

"MR. SMITH: Yes.

"MR. SABIN: Colorado objects to the offer of Kansas Exhibit six, for the reason that it is incompetent, irrelevant and immaterial, on the following grounds:

"FIRST: It is a deposition taken in another proceeding, not between the parties to this action, or suit.

"SECOND: That it relates to litigation between private citizens, and not between sovereign states.

"THIRD: That the issues involved in the present pending litigation in which this exhibit is offered, are matters of state concern, and not of private concern.

"FOURTH: This offered exhibit does not contain anything touching the issues, or any of them, involved in the present pending case in which it is offered, and does not prove or tend to disprove anything either for or against either party.

"FIFTH: The exhibit offered is only a portion of the testimony of the witness, Craig; and the offer omits 125 pages of the testimony of the witness, Craig, given at the time of the taking of the deposition in 1923, as shown by the copy of the deposition offered in evidence, and marked.

"SIXTH: Colorado further objects to the proffered exhibit, on the ground that the matters and things testified to by the witness, Craig, as shown by the copy of this deposition, offered, are matters which occurred prior to the closing of the taking of testimony in the case of Kansas versus Colorado, in 1905, and this objection being predicated upon the ground that all of those matters were foreclosed by the decision of the Supreme Court of the United States in the case of Kansas versus Colorado, decided in 1907. All of those matters, as we contend, being res adjudicata, and binding upon the parties to his case. We wish this particular ground of objection to be considered as including the objections made by counsel for Colorado this morning to the testimony of the witnesses, Simpson, McClurkin and Hurst.

"SEVENTH: No objection—. No showing is made by Kansas of any reason why this witness is not within the jurisdiction of this Court, and cannot be produced here to testify.

"This objection does not go to the character of the exhibit, itself, as being a mere copy instead of being a certified and authenticated copy."

5. That when all of the evidence is taken and this case is before this Honorable Court for final determination of

all of the issues of fact and of law said transcript containing both of said depositions and the respective offers and objections to the introduction thereof will be a part of the record for the then timely consideration.

6. That these depositions were offered in evidence before said commissioner by these defendants and even though the same are now a part of the transcript of such commissioner these defendants are asking this Honorable Court to now rule piecemeal on the admissibility of their own offer prior to the conclusion of the taking of testimony before said commissioner and prior to the final consideration of the whole case.

7. That the said A. J. Abbott died since his said deposition was taken; that the defendants admit "there is no living witness who can testify to all of the facts which were particularly within Judge Abbott's knowledge and recollection." (Page 2, Motion to Introduce Testimony.)

8. That defendants admit that "James Craig is the only living witness who can testify to the original character of the defendant Association's ditch. He came to Kansas in 1879; he had had experience in moving dirt, and he acted as the first superintendent in charge of the construction of this ditch. He testified as to the date of the commencement of this construction in 1880, when it was completed, and the date when the water was first put to beneficial use. He testified as to the intake of the ditch, the removal of the intake later to a point in Kearny county, the width of the ditch, the slope of its banks, its depth, its gradient, and its carrying capacity, and the amount of land that could be irrigated from it. *We claim a priority from the beginning of the construction of the ditch.* Craig's testimony shows that the construction was continuous until it was completed and the water turned into it. (Italic ours.)

"Counsel for the defendants assert that if this motion

is denied and Craig put on the stand his testimony in chief will be exactly like that offered here. His cross-examination will be the same and will throw no other light on the controversy." (Pages 12, 13, Brief in Support of Motion to Introduce Testimony.)

9. That complainant admits that were the deposition of the said James Craig now to be taken his testimony would be substantially the same as in his deposition now offered.

10. The defendants are now in no different position than they would be if the said offers of September 29 and 30, 1930, which were introduced over the said objections of complainant, were the offers of the testimony of the witnesses A. J. Abbott and James Craig in person before said Commissioner testifying to the same facts as stated in said depositions with the same objections of complainant made thereto.

11. The only effect of the ruling now sought by the defendants is to have the admissibility of the evidence here in question determined prior to the completion of the taking of testimony before the Commissioner and the final presentation and consideration of the case as a matter of substantive law and not as a matter of procedure.

12. That the defendants admit the rule which they are here seeking "is purely procedural." (Page 14, Brief in Support of Motion to Introduce Testimony.)

QUESTIONS PRESENTED.

I. Is the motion of defendants proper or necessary procedure at this stage of the case?

II. Is the rule which defendants are now seeking "purely procedural"?

ARGUMENT.

I.

1. THE MOTION IS NOT PROPER FOR

(a) It is irregular and is not sustained by authority or the practice of the court as is admitted by defendants in the last sentence of their brief. (Page 14.)

(b) The courts generally do not recognize any such procedure.

"The application now is that the court shall give its directions to the master to refuse to take evidence * * *. This does not seem to me to be in accordance with precedent or proper practice. The court appoints the master with special reference to his fitness to perform the duties imposed upon him. He is the court's representative, and it is his duty to pass upon all the questions of procedure as they come before him. His action is subject to review of the court, *but it must be only when he has concluded his labors, and the court has before it all the data* upon which his conclusions are founded. The duty of the master is to hear the parties fully, 'directing the mode in which the matters requiring evidence shall be proved before him,' as provided for in the seventy-seventh rule in equity. It is necessary that he should be given the power to avoid delays and confusion, and to relieve the court of the necessity of passing upon the materiality of every disputed question as it may arise in the progress of the hearing. Errors made by the master can be corrected upon the coming in of his report upon exceptions properly taken." (Italics ours.)

Hoe, et al. v. Scott, 87 Fed. 220.

Again we read:

"This is a motion to instruct the master in an equity action. * * * This objection was sustained by the master, and complainant's counsel excepted, and immediately gave notice of a motion for an order directing and instructing the master to take and state, and report to the Court, an account covering all the hinges referred to. *A certified copy of the proceedings before the master is presented upon this motion. But the master has made no report and has not sought instruction or advice from the Court.*

"The first objection interposed by the defendants is, that this application is irregular, and is not sustained by authority or the practice of the Court. I am of the opinion that the objection is well taken. Rule 77 gives the master very general discretion in the conduct of the investigation before him. He occupies, for the time being, the position of the Court, and is not to be continually interfered with, while discharging his duties to the best of his ability. *It would create intolerable delays and confusion, besides putting an unnecessary burden upon the Court, to hold, that each time the master makes a ruling the aggrieved party may, by special motion, have it reviewed.* The orderly, and, it seems, the generally accepted, procedure is, to present all the qustions arising before the master by objections and exceptions to his report.

"Let it be assumed that the direction asked for is within the discretion of the Court. It has not been customary to exercise it, and, in my judgment, it ought not to be exercised in a case like the present, where the master simply makes a ruling which he has an undoubted right to make. A decision for the complainant will be recorded for a precedent, and the attention of the Court continually occupied with similar applications. A simple and well understood system will thus be involved in confusion and uncertainty. The weight of authority sustains the view here taken." (Citing cases.) (Italics ours.)

Lull v. Clark, 22 Blatch. 207, 208, 209.

In the instant case all of the evidence is not yet taken and the whole transcript cannot be considered by the court. Nor, to our knowledge at least, has the stenographic commissioner submitted any of the transcript nor "sought instruction or advice from the court." Opposing counsel state:

"That the *defendants have deposited with the clerk of this court* the transcript of the testimony of Judge Abbott offered at Garden City, which will be found on page 921 of said transcript, and also the transcript of the evidence of James Craig offered at Garden City, which will be found on page 1148 of said transcript, for the examination of the court, if it desire to substantiate the facts set forth in this motion." (Italics ours.) (Page 5 of said motion.)

Under this state of facts the language of the Lull v. Clark case, *supra*, might well be adapted to the present case as follows:

"It would create intolerable delays and confusion, besides putting an unnecessary burden upon the court, to hold, that each time the Stenographic Commissioner included an offer of testimony, the objections thereto, and the particular evidence there in question, in his transcript the aggrieved party (here the party *offering* the testimony), may, by special motion, have its admissibility decided. The orderly, and, it seems, the generally accepted, procedure is, to present all the questions arising before the Stenographic Commissioner by objections made at the time and so appearing in his report or transcript."

The Supreme Court of Illinois stated this same principle regarding depositions in equity cases.

"When the party conceives that there is any irregularity or informality in taking the proofs, he may move to suppress depositions, and if the exceptions are overruled, he may except, but all questions as to the pertinency of evidence may be, and usually are, reserved to the hearing."

Swift, et al. v. Castle, 23 Ill. 209, 214.

See also:

Bate Refrigerating Co. v. Gillette, 28 Fed. 673, 674;

Nichol v. McCalister, 52 Ind. 586, 587;

Williams v. Vreelands, 30 N. J. Eq. 576, 578.

This question generally arises where there is a motion to "suppress" depositions or testimony. But in the instant case the motion of defendants attempts to "impress" the deposition. We adopt the word "impress" for the sake of clarity. We submit that the reasoning of these cases deferring the rule until final hearing on a motion to "suppress" applies *a fortiori* on a motion by the party offering evidence to "impress" the same before final hearing. Defendants should be satisfied with their own present offer of testimony at the final hearing, especially when they show

that they cannot produce any other on the point covered by the offer.

(c) Since there is no Supreme Court rule directly controlling this procedure in an original proceeding, we submit that the rule most analogous in the appellate practice should control. Supreme Court Rule No. 16 provides:

"In all cases of equity or admiralty jurisdiction, heard in this court, no objection to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence shall be entertained, unless such objection was taken in the court below and entered of record. Where objection was not so taken the evidence shall be deemed to have been admitted by consent."

That the requirements of this Honorable Court in this analogous rule have been met is clear from the above statements of fact 1 to 5, inclusive.

2. THAT THE MOTION IS UNNECESSARY, FOR

It is obvious, since defendants already have the offered testimony in the record of the Stenographic Commissioner so that its admissibility can be determined by this Honorable Court upon final hearing, defendants' motion can avail them nothing. The authorities cited in defendants' brief only present the question of whether the depositions of A. J. Abbott and James Craig in the *form* taken in a former case are admissible here. Supposing their present motion were denied, it would still be impossible for defendants to introduce testimony in any other form in this case on the points on which A. J. Abbott and James Craig testified in the offered depositions.

This according to their own showing that the former is dead and that there is no living witness to testify to the particular facts which were within his knowledge of this case in his lifetime and that the latter "is the only living witness who can testify" to certain facts in this case but that he is old and infirm and if he did now testify the testi-

mony would "be exactly like that offered here." See above statements of fact Nos. 7, 8, 9; also No. 9 wherein complainant admits that were James Craig to now testify in this action on the questions propounded in his offered deposition they would be substantially like that offered here.

On the other hand should their motion be granted and the tendered depositions held admissible, at least as to their *form*, the defendants would gain nothing more than they have already accomplished by offering the same before the Stenographic Commissioner who shows or will show the same in his transcript with the objections thereto for the consideration of this Honorable Court at the final hearing of this case.

That is to say complainants' objections to the offers (Statement of Facts 2 and 4), will still remain to be determined at the final hearing on the matters of substantive law there raised no matter how this motion is decided because in practice substantive law matters would not be decided before the final hearing and defendants state "The ruling desired here is, of course, not of substantive law." (Brief, page 14.)

II.

The rule which the defendants are here seeking is not "purely procedural."

1. Here, as often, the "form and procedure" are so intermingled with the "substantive" it requires caution to keep them separate. Defendants have inadvertently intermingled the "substantive" with the "procedural." See Statement of Facts No. 8.

In this quotation from paragraph VIII of their brief defendants advance an argument to sustain their motion which deals mainly not with the "procedural" but with the "substantive" law in this case. However, to be consistent with their theory that they now seek only a procedural

ruling and with their contention "that no right of the complainant can be injuriously affected by the admission of this testimony" in the form of a deposition of record in a prior case (Brief, page 14). they cite no authorities to support their "substantive" argument.

Construing defendants' motion and brief strictly the rule they desire here must be determined to be "purely procedural," even though based in part on "substantive" argument, but the "substantive" question of law must be determined at the final hearing.

2. Granting that defendants urged this "substantive" argument merely to show why they considered it important that proper procedure be followed to obtain the personal testimony in this case of James Craig in the event that this Honorable Court should rule that his testimony on the same points in the *form* of a deposition in a prior case was inadmissible because of such *form*, nevertheless it is not now necessary to sustain defendants' motion as to this matter of procedure because complainant admits, as stated above, that were the said James Craig to now testify personally concerning the matters in his offered deposition that his testimony would be substantially the same as in his deposition already offered herein.

CONCLUSION.

We submit that neither the filing of said motion and brief, nor the granting of said motion is necessary to protect any substantial right of the defendants or "to avoid useless expenditure of time, labor, and money" by either or both the complainant and the defendants. We have shown that had these offers been made before a master who had sustained complainant's respective objections thereto and the master held the offered depositions inadmissible, defendants would not even then be permitted

to prevail in a like motion direct to the court before the final hearing of the case especially when as a matter of procedure they would be unable to replace the testimony by that of other witnesses in a different form. Defendants already have all the testimony in the record of the Stenographic Commissioner that they could introduce even if they should prevail in their motion here for a "purely procedural" rule.

Complainant's objections, to the offered depositions, of which defendants complain go to their admissibility as a matter of substantive law which will be briefed at length by both parties upon the final submission of this case.

We further submit that the defendants' motion and brief should not be filed, or if such is permitted to be done, that their motion be denied and the question of the admissibility of the offered evidence here in question be reserved until the final hearing of this case.

Respectfully submitted,

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Office Supreme Court, U. S.
FILED
MAY 27 1928
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States.

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No. [redacted], ORIGINAL [redacted] 976

THE STATE OF COLORADO, COMPLAINANT

vs.

THE STATE OF KANSAS AND THE FINNEY COUNTY WATER USERS' ASSOCIATION, A CORPORATION,

DEFENDANTS.

Motion for Leave to Plead to Answer of the State of Kansas.

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